SUPREME COURT U.S.
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No. 02-861

In The Supreme Court of the United States

PETER CLAYTON MCCLENDON,

Petitioner,

v.

CITY OF COLUMBIA and JAMES R. CARNEY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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ARGUMENT FOR DENYING PETITION FOR WRIT OF CERTIORARI

I.

THE QUESTIONS PRESENTED DO NOT APPLY TO THE CITY OF COLUMBIA'S DISMISSAL.

The questions presented by the Petition concern specifically whether the "state created danger" is a viable cause of action under 42 U.S.C. § 1983 and/or how decisions of circuits other than the Fifth Circuit Court of Appeals should affect that Court's ruling on legal questions relevant to the "state created danger" theory, i.e., the "clearly established" principle for qualified immunity analysis. Among the questions presented by the Petition, there is no mention of the City of Columbia and its dismissal from this case nor is there any question with respect to municipal liability (including failure to train) in the context of the facts of this case and "state created danger."

It is readily apparent that Petitioner does not seek review of the City of Columbia's dismissal from this action and accepts the legal analysis by the District Court and Panel of the Fifth Circuit, which was termed "soundly reasoned" by the en banc Court. (Pet. App. 6). It is also noted that the dissenters to the en banc opinion did not question the legal analysis leading to the City of Columbia's dismissal. The Petitioner sought no rehearing from the panel's decision affirming dismissal of the City of Columbia by the District Court and made no mention of the City of Columbia's dismissal in the Supplemental Brief for Appellant, Peter Clayton McClendon, for Rehearing En Banc. Since the Petition does not present questions for

review regarding municipal liability (including failure to train), there should be no such review by this Court.

II.

THE LEGAL ANALYSIS AFFIRMING THE CITY OF COLUMBIA'S DISMISSAL IS NOT IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS OR THIS COURT.

Assuming arguendo that Petitioner does implicate the legal reasoning behind the City of Columbia's dismissal, neither the Fifth Circuit's en banc ruling nor the panel's ruling affirming the District Court's dismissal of the City of Columbia conflict with decisions of this Court or of other United States Circuit Courts of Appeal. In the seminal case of *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), wherein the Court found municipalities can be held liable under 42 U.S.C. § 1983, the Court also held that liability could not be found "unless action pursuant to official municipal policy of some nature caused a constitutional tort." 436 U.S. at 691, 98 S.Ct. at 2036. Additionally, the Court held that "a municipality cannot be held liable under § 1983 on a respondeat superior theory. 436 U.S. at 691, 98 S.Ct. at 2036. The Court went on to conclude that it is only when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Monell*, 436 U.S. at 694, 98 S.Ct. at 2037-2038.

Monell has been cited, applied and further defined in countless discussions by this Court, as well as federal and

state courts. There are two constants running through all cases subsequent to *Monell*: (1) a municipal policy or custom must be shown which causes the injury; and (2) a single incident or instance is ordinarily insufficient to establish municipal policy or custom, and almost always insufficient on failure to train cases. In addition to those cases discussed below, see also *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985).

The City demonstrated that it did, in fact, have a policy concerning the storage of weapons to be used as evidence. (App. 1). Petitioner has failed to show similar instances on the part of the City of Columbia sufficient to establish municipal policy or custom. Petitioner has also failed to show that the single action by a city employee was in any way sufficient to warrant municipal liability under the Court's reasoning in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986).

"Failure to train" cases have likewise been considered by this Court on numerous occasions. The jurisprudence of this issue is entirely consistent with the City of Columbia's dismissal by the District Court and subsequent affirmance on appeal. Beginning with the "deliberate indifference" standard established by *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388-389, 109 S.Ct. 1197, 1204-1205, 103 L.Ed.2d 412 (1989), there is no inconsistency with legal analysis on municipal liability justifying dismissal of the City of Columbia. Furthermore, there has been no case of a similar factual pattern allowing a "single incident" to establish municipal liability. (Comparing *Brown v. Bryan County, OK*, 219 F.3d 450 (5th Circuit 2000), with *Board of the County Comm'rs of Bryan County, OK v. Brown*, 520 U.S. 397, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997).

The Petitioner's case is not about the absence of training but the absence of training to prevent a specific action by a municipal employee when the action at issue had not, at the time of occurrence, ever been identified as a constitutional violation. Under *Board of the County Comm'rs of Bryan County v. Brown, supra*, it is clear that "rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee. See *Canton, supra,* 489 U.S. at 391-392, 109 S.Ct. at 1206-1207; *Tuttle, supra,* at 824, 105 S.Ct. at 2436 (plurality opinion). See also *Springfield v. Kibble*, 480 U.S. 257, 270-271, 107 S.Ct. 1114, 1121-1122, 94 L.Ed.2d 293 (1987) (per curiam) (dissent from dismissal of writ as improvidently granted)." *Board of the County Comm'rs,* 520 U.S. at 405, 117 S.Ct. at 1389.

The Petitioner relies on *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1988) for the assertion that the en banc majority did not follow other circuits' interpretations of that case. There can be no assertion by the Petitioner of any conflict created between this Court's and the Fifth Circuit's treatment of the municipal liability question since *DeShaney* itself concluded,

> Because we conclude that the Due Process Clause did not require the State to protect Joshua from his father, we need not address respondents' alternative argument that the individual state actors lacked the requisite "state of mind" to make out a due process violation. See *Daniels v. Williams*, 474 U.S., at 334, n. 3, 106 S.Ct., at 666, n. 3. *Similarly, we have no occasion to consider whether the individual respondents might be entitled to a qualified immunity defense,*

> *see Anderson v. Creighton,* 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), *or whether the allegations in the complaint are sufficient to support a § 1983 claim against the county and DSS under Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), *and its progeny.* 489 U.S. 189, 202 n. 10 (emphasis added).

The Petitioner has asserted no inconsistencies among the circuits with decisions of this Court applying principles pertaining to municipal liability (including failure to train) which support the City of Columbia's dismissal. Any review of the City of Columbia's dismissal from this action is therefore precluded.

CONCLUSION

For all of the foregoing reasons, Respondent, City of Columbia, respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

PETER CLAYTON MCCLENDON — PLAINTIFF

VERSUS — CIVIL ACTION NO. 2:96CV255PG

CITY OF COLUMBIA, MISSISSIPPI, ET AL — DEFENDANTS

DEPOSITION OF JOE SANDERS
AUGUST 20, 1998

REPORTED BY:

J. STACY HEAD
CERTIFIED SHORTHAND REPORTER
CSR NO. 1201

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Hattiesburg, Mississippi 39401
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* * *

[14] the disposal or preservation of evidence?

A. No. We just – we had an – just an oral policy, you know.

Q. What was your oral policy?

A. Well, if they got in – got a gun, anything, any drugs, they would put it in a box that was locked and it couldn't be got out unless someone had a key. Then the detectives, two detectives, had a key – the only ones that had a key, and they would go get it the next day and take it out of the box and put in the evidence room.

Q. So who had keys to the box?

A. Carroll Bryant and James Carney.

Q. Did you have a key?

A. Did not.

Q. Did anyone from the city government have a key?

A. Not to my knowledge.

Q. Did any one of your staff members have a key?

A. No.

Q. And then who had – was the evidence room, was it a locked room?

A. Yes, it was.

Q. Does it have windows?

A. I don't think, no.

Q. Who had keys to the evidence room?

A. Carroll Bryant and James Carney.

[15] Q. Did you have a key to the evidence room?

A. Did not.

Q. And what, if any, policy or procedure did you provide to Carney and/or Carroll Bryant regarding the proper way to handle the box and the proper way to handle the room?

A. Well, you know, they knew what – you know, to drop it in the box when it come in; then the next day, they'd get it out and put it in the evidence room. They did that all the time.

Q. So did you have any kind of written policy or procedures regarding how to handle evidence that came in the lockbox or that went into the evidence room?

A. No.

Q. What would happen when you would need evidence to go to court?

A. Well, I'd have to get with Carroll Bryant usually – chief detective – and then he would get it and sign it out, you know.

Q. What type of document did he sign it out on?

A. Well, he had a little slip there he – at the – you know fix up there.

Q. A little slip you said?

A. Yeah – well, it was a pretty large piece of paper there where he was releasing it to you, you know.

[16] Q. All right. I'm going to show you some documents here and ask if you can look at those. Can you identify that document?

A. Yes.

Q. What is that?

A. That's stuff that was taken out of the evidence box.

Q. And does it reflect where it was taken to?

A. I don't believe, but it was taken to the evidence room.

Q. Okay. So that – explain for me where that list was kept, that sheet was kept.

A. In the evidence room.

Q. In the evidence room?

A. Yes. To my knowledge that's where it was at, I guess.

Q. When somebody would check in evidence, is that what they would sign when they dropped it in the box, or do you recall?

A. I don't recall.

Q. Did you ever draft any type of policy or procedure about how to record evidence and what was being done with it?

A. No.

Q. You just left that to Carroll Bryant and

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

PETER CLAYTON MCCLENDON — PLAINTIFF

VERSUS — CIVIL ACTION NO. 2:96CV255PG

CITY OF COLUMBIA, MISSISSIPPI,
AND JAMES R. CARNEY — DEFENDANTS

DEPOSITION OF JAMES CARNEY

DATE: December 29, 1998

PLACE: 338 Church Street
Columbia, Mississippi

TIME: 2:30 o'clock p.m.

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COUNSEL FOR JAMES CARNEY

REPORTED BY: Nancy G. Binder, CSR #1337

[7] Q. How many other detectives besides you and –

A. Just the two of us.

Q. What was your normal procedure as far as removing evidence from the evidence box?

A. Let me make sure I understand the evidence box. Are you talking about the little box in the back where the patrolmen put the evidence?

Q. Right. Let me show you a picture of it. This is a photograph. I believe this is the evidence box. Does that look familiar to you?

A. Yes. It's changed locations since I was there, but that's it.

Q. Where was it located when you were there?

A. It was on a wall by itself when I was there. Wasn't any file cabinets around it.

Q. And was it located in anyone's particular office or –

A. It was located in the back in what they called the shift change room at that time.

Q. Okay. When you were there – I'm going to show you some pictures and it looks like little envelopes and what not on top of the box. Did you have those back then?

A. Yes.

Q. All right, did you have an evidence log?

A. Yes.

Q. Let me show you, and again we're looking at the same piece of paper that we showed Officer Elkins, this evidence box. Does that look familiar to you?

A. Yes, it does.

[8] Q. What is that?

A. It's the evidence box stuff taken in and myself or Carroll Bryant, whoever took it out, signed on the far side over here.

Q. And that's your signature where it says "J. Carney"?

A. Yes.

Q. Just explain for me how you would on a day to day basis deal with the evidence in the evidence box? Did you go daily and empty it or –

A. No, I did not. Usually Detective Bryant or myself one would, as you see from the dates here – just looking at this it skips 4/18, 6/14, 6/16, 7 something.

Q. So once or twice a month you would take the evidence out?

A. Depending on what the situation was and the need to get the evidence out of it.

Q. When you took the evidence out of the box, you would sign there that you had taken it out?

A. Right.

Q. What would you do with it after you took it out?

A. Depending on what it was really.

Q. Was there any place that you kept a record that indicated where it went after it left the box?

A. No, there was not.

Q. So, for example, and I'm just using a hypothetical, but you could perhaps take it out of your evidence box and maybe take it to court with you or give it to someone to take to court?

A. You theoretically you could. Generally what happened if it was going to be used in a case, it went in the evidence room.

[9] Q. Did you have a log in the evidence room?

A. No, there was not.

Q. There was no way to track what came into the evidence room?

A. No, there was not.

Q. The only record you have of what was done with actual evidence seized is this evidence box log?

A. That's all that I recall.

Q. And then Officer Elkins was in here earlier –

A. In case of a firearm or something, now in my office if I released a firearm back to someone, I had a form that they signed and so forth and I kept the list of it, and I believe Carroll had the same thing in his office. Generally, he released the firearms back to people.

Q. So you had a weapon log that you kept in your office?

A. Yes, I did.

Q. And he had one as well?

A. Yes.

Q. Was there ever a time when you, for example, if you were taking a gun to be used in court, would you record that on your log and did you only record when you gave weapons back to people?

A. It was just a weapons log that any weapons I had in my office were recorded on there, and also like I say, if it was released back to anyone that was recorded and, of course, they signed a form saying that they had gotten the weapon back.

Q. Was that called a property invoice? I'm sorry, release authorization slip?